IN THE

SUPREME COURT OF MISSOURI

No. SC93061

LOREN COOK CO.,
Appellant,

v.

DIRECTOR OF REVENUE,
Respondent.

On Petition for Review from the
Missouri Administrative Hearing Commission

BRIEF OF APPELLANT

MARK A. OLTHOFF (MO #38572)
SCOTT LINDSTROM (MO #57153)
JON R. DEDON (MO #62221)
POLSINELLI PC
1600 Twelve Wyandotte Plaza
120 W 12th Street, Suite 1600
Kansas City, Missouri 64105
(816) 421-3355
(816) 374-0509 (FAX)
molthoff@polsinelli.com
slindstrom@polsinelli.com
jdedon@polsinelli.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

This appeal involves the questions of: (1) whether the "taken in trade" reduction found at RSMo §144.025.1 can be applied to the purchase of aircraft, taxed under the general use tax found at RSMo § 144.610, and (2) whether Appellant's use of a third-party intermediary permits application of RSMo §144.025.1's "taken in trade" reduction. RSMo §§144.025.1 and 144.610 are revenue laws of the State of Missouri. Hence, this appeal involves the construction of revenue laws of this State, and this Court has jurisdiction under Article V, Section 3 of the Missouri Constitution.

In addition, this is an appeal from a final decision of the Administrative Hearing Commission, and RSMo § 621.189 provides for this Court's review of final decisions of the Administrative Hearing Commission in cases arising pursuant to the provisions of section 621.050, RSMo, "when constitutionally required."

POINTS RELIED ON

I. The Administrative Hearing Commission erred in concluding the "taken in trade" reduction found at RSMo §144.025.1 cannot be applied to the purchase of aircraft taxed under the general use tax found at RSMo § 144.610, because such a conclusion is inconsistent with previous Missouri Supreme Court precedent, the language of the statutes, and the Commerce Clause of the United States Constitution, in that such a conclusion would cause the use tax to exceed the sales tax and impose a discriminatory burden on interstate commerce.

Associated Industries of Missouri v. Lohman, 511 U.S. 641 (1994).

Great Southern Bank v. Director of Revenue, 269 S.W.3d 22, 26 n.2 (Mo. banc 2008).

Southwestern Bell Yellow Pages, Inc. v. Director of Revenue, 94 S.W.3d 388, 392 (Mo. banc 2002).

II. The Administrative Hearing Commission erred in concluding that Appellant's use of a third-party intermediary to facilitate its aircraft trade-in precluded application of the "taken in trade" reduction, because the trade-in satisfied all elements of RSMo §144.025.1, in that Appellant's relinquishment of the old aircraft and purchase of the new aircraft were mutual, interdependent transactions.

RSMo §144.025.1

Internal Revenue Code of 1986 § 1031

Great Southern Bank v. Director of Revenue, 269 S.W.3d 22, 26 n.2 (Mo. banc 2008).

III. The Administrative Hearing Commission erred in failing to apply its decision on a prospective-only basis, because decisions that are not reasonably foreseeable or reflect new policy are to be applied prospectively only under RSMo §§ 32.053 and 143.903, in that the decision was not reasonably foreseeable because it exceeds previous Missouri Supreme Court precedent.

RSMo § 143.903

RSMo § 32.053

Great Southern Bank v. Director of Revenue, 269 S.W.3d 22, 26 n.2 (Mo. banc 2008).

I. BACKGROUND

A. NATURE OF THE CASE

This is an appeal from a December 7, 2012 Administrative Hearing Commission ("AHC") decision (L.F. 00016-00022).[1] The AHC's decision disallowed Loren Cook Co.'s ("Loren Cook" or "Appellant") application of the "taken in trade" reduction found at RSMo §144.025.1 to an aircraft trade-in transaction, and upheld the Director of Revenue's ("DOR" or "Respondent") assessment of $264,600.00 (plus interest) of additional Missouri use tax following Respondent's audit of Loren Cook's purchase of a Cessna Citation CJ3 Model 525 aircraft, Registration No. N503LC ("Purchased Cessna 525B") and a corresponding relinquishment of a Cessna Citation CJ2 Model 525A aircraft, Registration No. N464C ("Relinquished Cessna 525A"). (L.F. 00016, 00022). The principal issue is whether the disposition of the Relinquished Cessna 525A in conjunction with the purchase of the Purchased Cessna 525B qualifies as a trade-in for purposes of RSMo § 144.025.1. The AHC held that it did not because (1) RSMo §144.025.1's "taken in trade" reduction does not apply to aircraft purchases taxed under the general use tax found at RSMo § 144.610, and (2) the purchase of the Cessna 525B and relinquishment of the Cessna 525A were separate transactions.

[1] "L.F." refers to the Legal File, and "A- " refers to the Appendix to Brief of Appellant

B. STIPULATED FACTS

The parties stipulated to the following facts. (*See generally* L.F. 00012-00015). On February 17, 2009, Carrie Stephenson of the Missouri Department of Revenue met with Mike Stone of Loren Cook to begin an audit concerning Loren Cook's purchase of a 2007 Cessna 525B aircraft with a registration number of N503LC. (L.F. 00014). Mr. Stone explained to Ms. Stephenson that Loren Cook reported the purchase of the 2007 Cessna 525B aircraft on its use tax return for the period from April 1, 2007 to June 30, 2007 ("Loren Cook's Return") when it became subject to use tax in Missouri. (L.F. 00014). Mr. Stone provided a copy of Loren Cook's Return to Ms. Stephenson during the audit along with other documents that Mr. Stone used to explain Loren Cook's Return. (L.F. 00014). These documents included delivery receipts demonstrating that the 2007 Cessna 525B was delivered to Loren Cook on or after June 26, 2007 in Wichita, Kansas. (L.F. 00014). Mr. Stone later confirmed that, after departing Kansas, the 2007 Cessna 525B first arrived in Missouri at the Springfield airport, which is located within the city limits of Springfield, Missouri. (L.F. 00014). A state and local use tax rate of 5.6% applied at the airport in Springfield, Missouri, at the time when the 2007 Cessna 525B aircraft first arrived in Missouri. (L.F. 00014).

Loren Cook's Return reported $2,515,125.00 of the total $7,240,125.00 purchase price of the 2007 Cessna 525B aircraft because Loren Cook claimed a trade-in credit against the purchase price in the amount of $4,725,000.00 under RSMo § 144.025.1. (L.F. 00014). The $4,725,000.00 credit claimed by Loren Cook was the trade-in value,

as shown on the invoice, of Loren Cook's 2002 Cessna 525A aircraft with a registration number of N464C. (L.F. 00014). Based upon the trade-in credit, Loren Cook reported and paid $140,847.00 of use tax on its purchase of the 2007 Cessna 525B aircraft.[2] (L.F. 00014). Respondent's auditor disallowed the trade-in credit, and contends that there was an underpayment of use tax on Loren Cook's Return in the amount of $264,600.00. (L.F. 00015).

On January 22, 2010, the Respondent issued an assessment of use tax ($264,600.00) and statutory interest ($45,054.47) against Loren Cook in the total amount of $309,654.47 for the period including June of 2007 (Assessment No. 201000705970023). (L.F. 00012). The Assessment was a final decision of the Respondent. On March 19, 2010, Loren Cook timely appealed Respondent's final decision to the AHC which had jurisdiction under RSMo §§ 144.261 and 621.050. (L.F. 00013)

C. ADDITIONAL FACTS

The AHC held a hearing on December 15, 2010. During the course of the hearing, a number of additional facts were established regarding the structure of the trade-in transaction.

[2] The remaining $16,644.28 of use tax reported and paid on Loren Cook's Return is irrelevant to this action. (L.F. 00014).

Loren Cook entered into a Purchase Agreement between Loren Cook, as Purchaser, and Cessna Aircraft Company, as Seller, for the Purchased Cessna 525B on August 16, 2005. The Purchase Agreement was amended by Amendment No. 1 dated May 4, 2006, Amendment No. 2 dated November 14, 2006, and Amendment No. 3 dated January 2, 2007 (Loren Cook's Exhibit 2, documents 2 – 5, LCCs 000196, 000203, 000205, and 000208).

Loren Cook entered into an Offer to Purchase between Loren Cook, as Seller, and CB Aviation LLC, as Buyer, dated June 11, 2007 for the Relinquished Cessna 525A (Loren Cook's Exhibit 1, document 2, LCC 000297). Loren Cook thereafter entered into the Aircraft Sales Agreement between Loren Cook, as Seller, and C.B. Aviation, LLC, as Purchaser for the Relinquished Cessna 525A dated June 15, 2007. The Aircraft Sales Agreement was amended by Amendment No. 1 dated June 25, 2007 (Loren Cook's Exhibit 1, documents 3 and 18, LCCs 000300 and 000400).

In order to accomplish the trade-in of the Relinquished Cessna 525A for the Purchased Cessna 525B, and to facilitate recognition as an Internal Revenue Code exchange, Loren Cook used a third-party intermediary, TVPX Sales, LLC ("TVPX"). TVPX, a licensed aircraft dealer, took legal title to the aircraft (Tr. at pp. 92–93) which was significant to effect the transaction (Tr. at pp. 96–97) and assumed a risk of loss while it held title (Tr. at pp. 107–112).

On June 18, 2007, Loren Cook entered into the Exchange and Trade-in Contract between Loren Cook, Exchangor, and TVPX, Qualified Intermediary for the

Relinquished Cessna 525A (Loren Cook's Exhibit 1, document 6, LCC 000325). On June 18, 2007, Loren Cook entered into the Escrow Agreement between Loren Cook as Exchangor, TVPX Sales as Qualified Intermediary, and Wachovia Bank, N.A. as Escrow Agent, for the Relinquished Cessna 525A (Loren Cook's Exhibit 1, document 7, LCC 000337).[3]

On June 19, 2007, the Purchase Agreement for the Purchased Cessna 525B was assigned to TVPX pursuant to the Assignment of Purchase Agreement, between TVPX as Assignee, Loren Cook as Exchangor, and Cessna Aircraft Company as Seller (Loren Cook's Exhibit 2, document 6, LCC 000210). Also on June 19, the Aircraft Sales Agreement for the Relinquished Cessna 525A was assigned to TVPX pursuant to the Assignment of Sales Agreement between TVPX as Assignee, Loren Cook as Exchangor, and C.B. Aviation, LLC as Buyer, for the Relinquished Cessna 525A (Loren Cook's Exhibit 1, document 8, LCC 000351).

TVPX thereafter took title to the Relinquished Cessna 525A, and numerous documents make clear that TVPX was the airplane's genuine owner. First, Loren Cook issued an Aircraft Bill of Sale (dated June 26, 2007) to TVPX as purchaser of the Relinquished Cessna 525A, which was signed on behalf of Loren Cook as Seller, (Loren

[3] Loren Cook also entered into the letter agreement and Joint Escrow Instructions for the Purchased Cessna 525B with TVPX as Qualified Intermediary/Dealer and Aero Records and Title Co. as Escrow Agent, dated June 21, 2007 (Loren Cook's Exhibit 2, document 9, LCC 000248).

Cook's Exhibit 1, document 21, LCC 000407). Second, Loren Cook issued the Warranty Bill of Sale (dated June 26, 2007) to TVPX as Purchaser of the Relinquished Cessna 525A, which was signed by Loren Cook, Seller (Loren Cook's Exhibit 1, document 22, LCC 000410). Third, the FAA issued the Certificate of Aircraft Registration, dated July 5, 2007, for the Relinquished Cessna 525A canceling Loren Cook's recognized ownership and indicating TVPX as the Transferee (Loren Cook's Exhibit 1, document 29, LCC 000427). TVPX completed a Kansas Resale Exemption Certificate evidencing its acquisition of the Relinquished Cessna 525A for resale (Loren Cook's Exhibit 1, document 24, LCC 000416). Finally, the Delivery Receipt and Acceptance for the Relinquished Cessna 525A, between C.B. Aviation, LLC as Purchaser and TVPX as Seller, was dated June 26, 2007 (Loren Cook's Exhibit 1, document 27, LCC 000422).

Similarly, numerous documents illustrate that TVPX actually took title to and owned the Purchased Cessna 525B. First, Cessna issued its Invoice to TVPX for the Purchased Cessna 525B aircraft, dated June 20, 2007 (Loren Cook's Exhibit 2, document 7, LCC 000215). Second, Cessna issued the Aircraft Bill of Sale, dated June 26, 2007, to TVPX as Purchaser of the Purchased Cessna 525B, which was signed by Cessna Aircraft Company as Seller (Loren Cook's Exhibit 2, document 16, LCC 000248). Third, Cessna issued the Warranty Bill of Sale, dated June 26, 2007, to TVPX as Purchaser of the Purchased Cessna 525B, which was signed by Cessna Aircraft Company as Seller (Loren Cook's Exhibit 2, document 17, LCC 000250). Fourth, the Delivery Receipt for the Purchased Cessna 525B, between TVPX as Purchaser and Cessna Aircraft Company as

Seller, was signed June 26, 2007 (Loren Cook's Exhibit 2, document 18, LCC 000252). Finally, TVPX completed a Kansas Resale Exemption Certificate evidencing its acquisition of the Purchased Cessna 525B for resale (Loren Cook's Exhibit 2, document 19, LCC 000254).

TVPX in turn issued its Invoice (dated June 26, 2007) to Loren Cook for the Purchased Cessna 525B aircraft. (Loren Cook's Exhibit 2, document 13, LCC 000240). The Invoice shows the purchase price of the Purchased Cessna 525B was $7,240,125.00, the trade-in value of the Relinquished Cessna 525A was $4,725,000.00, and the Cash Trade Difference was $2,515,125 (Loren Cook's Exhibit 2, document 13, LCC 000240). Loren Cook completed the FAA Aircraft Registration Application for the Purchased Cessna 525B, as Applicant, dated June 26, 2007 (Loren Cook's Exhibit 2, document 24, LCC 000266). Loren Cook signed the Affidavit of Delivery to a Nonresident of Kansas for the Purchased Cessna 525B dated June 26, 2007 (Loren Cook's Exhibit 2, document 25, LCC 000268).

II. ARGUMENT

A. The Administrative Hearing Commission erred in concluding the "taken in trade" reduction found at RSMo §144.025.1 cannot be applied to the purchase of aircraft taxed under the general use tax found at RSMo § 144.610, because such a conclusion is inconsistent with previous Missouri Supreme Court precedent, the language of the statutes, and the Commerce Clause of the United States Constitution, in that such a conclusion would

cause the use tax to exceed the sales tax and impose a discriminatory burden on interstate commerce.

1. Standard of review:

The question of whether the "taken in trade" reduction can apply to a transaction involving an aircraft taxed under the general use tax is a question of law, which this Court reviews de novo. *See Branson Properties USA, L.P. v. Director of Revenue*, 110 S.W.3d 824, 825 (Mo. banc 2003).

2. The AHC's conclusion that RSMo §144.025.1 does not apply to the general use tax found at RSMo § 144.610 is inconsistent with the language of the relevant statutes, the Commerce Clause of the United States Constitution, and prior Missouri Supreme Court precedent.

RSMo §144.025.1 provides, in pertinent part:

> .1 Notwithstanding any other provisions of law to the contrary, in any retail sale other than retail sales governed by subsections 4 and 5 of this section, where any article on which sales or use tax has been paid, credited, or otherwise satisfied or which was exempted or excluded from sales or use tax is taken in trade as a credit or part payment on the purchase price of the article being sold, the tax imposed by sections 144.020 and 144.440 shall be computed only on that portion of the purchase price which exceeds the actual

> allowance made for the article traded in or exchanged, if there is a bill of sale or other record showing the actual allowance made for the article traded in or exchanged.

Pursuant to this statute, Loren Cook paid use tax only on the portion of the Purchased Cessna 525B that exceeded the value of the Relinquished Cessna 525A.

The AHC first held that RSMo §144.025.1's "taken in trade" exception did not apply because transactions involving airplanes are not subject to taxation under either section 144.020 or section 144.440. (L.F. 00620-21). Rather, they are subject only to the general use tax found at section 144.610. (L.F. 00621). The AHC's conclusion is wrong.

First, the AHC's conclusion is inconsistent with this Court's holding in *Great Southern Bank v. Director of Revenue*, 269 S.W.3d 22 (Mo. banc 2008). In that case, the taxpayer also attempted a trade-in under RSMo §144.025.1 in a transaction involving two airplanes, taxable under the general use tax. This Court specifically recognized that "The [taken in trade] exemption applies to the use tax." *Id.* at 26 n.2.

Second, the structure of the statutory scheme suggests that the General Assembly intended that the "taken in trade" exception apply to the use tax. As the AHC correctly noted, the transaction at issue in this case is subject to the "general use tax" under § 144.610.1. This section imposes a tax "in an amount equivalent to the percentage imposed on the sales price in the sales tax law in section 144.020." Section 144.020, in turn, imposes a tax "equivalent to four percent of the purchase price paid or charged, or in case such sale involves the exchange of property, a tax equivalent to four percent of the consideration paid or charged, including the fair market value of the property exchanged

at the time and place of the exchange, *except as otherwise provided in section 144.025*; ...." (emphasis added). Thus the tax imposed by § 144.610 incorporates by reference the provisions of § 144.020, which expressly contemplates an exchange of property and incorporates the trade-in credit of § 144.025. It follows that the trade-in credit of § 144.025 is applicable to the "general use tax" under the plain language of these statutes, and the Commission's conclusion to the contrary is not supported by law.

Third, "the primary function of a use tax is to complement the sales tax, to supplement and protect the sales tax, to complement the sales tax by creating equality of taxation of purchasers on use of property purchased outside the state which cannot be reached as sales because of the commerce clause of the federal constitution." *Farm & Home Sav. Ass'n v. Spradling*, 538 S.W.2d 313, 317 (Mo. 1976) (citing *Southwestern Bell v. Morris*, 345 S.W.2d 62, 66 (Mo. banc 1961). This Court reiterated that conclusion in *Southwestern Bell Yellow Pages, Inc. v. Director of Revenue*, 94 S.W.3d 388, 392 (Mo. banc 2002), stating that "[t]he use tax complements the sales tax by creating 'equality of taxation' among products purchased within and without the state." In applying this principle, this Court has long held that exemptions from the use tax must precisely mirror the exemptions from the sales tax. *See Southwestern Bell Telephone Company v. Morris*, 345 S.W.2d 62 (Mo. banc 1961). Under the AHC's ruling, however, this is not the case. Instead, the ruling holds that items purchased outside the state in exchange transactions involving a trade-in are subject to a higher tax than identical transactions occurring within the state. There is no "equality of taxation" under this reading of the statutes. For this reason, the AHC's reading of § 144.025 is inconsistent with the complementary

nature of the sales and use taxes and with the principle of "equality of taxation," and this Court must therefore reject it.

Finally, the AHC's conclusion that the trade-in credit in § 144.025 does not apply to the use tax runs afoul of the Commerce Clause of the United States Constitution, which prohibits discrimination against interstate commerce. U.S. Const., art. 1, §8, cl. 3; *Associated Industries of Missouri v. Lohman*, 511 U.S. 641 (1994). The United States Supreme Court has concluded that "where the use tax exceeds the sales tax, the discrepancy imposes a discriminatory burden on interstate commerce." *Associated Industries*, 511 U.S. at 649. The Commerce Clause prohibits this type of discrimination. As the Court explained:

> The Commerce Clause prohibits economic protectionism-that is, "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." Thus, we have characterized the fundamental command of the Clause as being that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the state[.]"

Id. at 647 (citations omitted).

The AHC's interpretation of §144.025.1 results in the precise type of economic protectionism that the Commerce Clause prohibits because it would allow the trade-in credit in the case of an in-state transaction, but not in an identical out-of-state transaction.

Such an interpretation impermissibly discriminates against out-of-state businesses in favor of in-state businesses.

Under Missouri's use tax statutes, the tax does not apply in instances where it would result in an unconstitutional burden on interstate commerce. Specifically, § 144.615 provides that the "general use tax" does not apply to: "[p]roperty, the storage, use or consumption of which this state is prohibited from taxing under the constitution or laws of the United States." As explained above, the United States Constitution prohibits the state from imposing a higher tax on interstate transactions than on transactions occurring within the state. Because in-state transactions indisputably are subject to the trade-in credit of § 144.025, it follows that, under § 144.615, the use tax does not apply to the trade-in value of property exchanged for property that is subject to the use tax in an out-of-state transaction. Otherwise, the use tax would apply to "property that this state is prohibited from taxing under the constitution ... of the United States."

For these reasons, the AHC erred holding that § 144.025 exemption does not apply to the general use tax of § 144.610. The trade-in credit applies to use tax transactions, including the transaction at issue here.

B. The Administrative Hearing Commission erred in concluding that Appellant's use of a third-party intermediary to facilitate its aircraft trade-in precluded application of the "taken in trade" reduction, because the trade in satisfied all elements of RSMo §144.025.1, in that Appellant's relinquishment

of the old aircraft and purchase of the new aircraft were mutual, interdependent transactions.

1. Standard of review:

The AHC's interpretation of revenue laws is reviewed de novo. *DST Sys., Inc. v. Dir. of Revenue*, 43 S.W.3d 799, 800 (Mo. banc 2001). The AHC's factual determinations will be upheld if the law supports them, and, after reviewing the whole record, there is substantial evidence that supports them.

2. The Relinquished Cessna 525A Was "Taken in Trade" as a Credit or Part Payment for the Purchased Cessna 525B.

The term "taken in trade" is not defined in the use tax statute. Under Missouri law, when a statutory term is not defined, courts apply the ordinary meaning of the term as found in the dictionary. *Cook Tractor Co., Inc. v. Dir. of Revenue*, 187 S.W.3d 870, 873 (Mo. banc 2006). In *Great Southern Bank v. Dir. of Revenue*, 269 S.W.3d 22, 25 (Mo. banc 2008), the Court used the following definitions for "trade" and "exchange" from Webster's Third New International Dictionary (1993) ("Websters"). The word "trade" means "to give in exchange for another commodity." Webster's at 2421. The word "exchange" means "[t]he act of giving or taking one thing in return for another," or "the process of reciprocal transfer of ownership (as between persons)." Webster's at 792.

Loren Cook's relinquishment of the Relinquished Cessna 525A and its purchase of the Purchased Cessna 525B is a trade-in under RSMo § 144.025.1. The steps taken by Loren Cook were part of one mutual, interdependent transaction resulting in Loren Cook

transferring title to the Relinquished Cessna 525A to TVPX in return for title to the Purchased Cessna 525B, resulting in a reciprocal transfer of ownership between Loren Cook and TVPX. The "Exchange and Trade-in Contract" explicitly reflects the intentions of Loren Cook to obtain the trade-in credit under Missouri's use tax statute. First, the title of and headings within the document reflect the sum and substance of the aircraft transaction as including a trade-in. Second, the Relinquished Cessna 525A is identified as the "Trade-In Aircraft." Third, the qualified intermediary, TVPX, is identified as an FAA registered aircraft dealer holding certificate number D002621 which will receive and take title to the trade-in aircraft. Finally, the contract in various paragraphs refers to the Relinquished Cessna 525A being conveyed to the dealer as a "trade-in" and payment of the cash difference in exchange for the Purchased Cessna 525B aircraft (Loren Cook's Exhibit 1, document 6, LCC 000325-000326).

TVPX is registered with and licensed as an aircraft dealer by the United States Federal Aviation Administration (Loren Cook's Exhibit 1, document 6, LCC 00325; Tr. at pp. 29-30 and 92-93). Prior to the sale of the Purchased Cessna 525B to Loren Cook, TVPX had title to the Purchased Cessna 525B and had filed its ownership with the FAA (Loren Cook's Exhibit 2, document 16, LCC 000248). Prior to the relinquishment of the Relinquished Cessna 525A to TVPX, Loren Cook had title to the Relinquished Cessna 525A and had filed its ownership with the FAA (Loren Cook's Exhibit 1, documents 14 and 15, LCCs 000377 and 000383). Loren Cook received the Purchased Cessna 525B from TVPX on June 26, 2007, the same day that Loren Cook delivered the Relinquished

Cessna 525A to TVPX (Loren Cook's Exhibit 1, document 23, LCC 000413; Loren Cook's Exhibit 2, document 23, LCC 000264).

Accordingly, the Relinquished Cessna 525A was "taken in trade" as a credit or part payment for the Purchased Cessna 525B. That Loren Cook intended the trade-in is further evidenced by the Exchange and Trade-In Contract referring to the parties' intent to engage in a trade-in (Loren Cook's Exhibit 1, document 6, LCC 00325). This intention and result should be recognized as valid under Missouri law.

3. The Invoice Shows the Actual Allowance Made for the Relinquished Cessna 525A Traded In or Exchanged.

The requirement in RSMo. § 144.025.1 that there is a bill of sale or other record showing the actual allowance made for the article traded in or exchanged is easily satisfied here. The Invoice, dated June 26, 2007, from TVPX to Loren Cook, shows that the purchase price of the Purchased Cessna 525B was $7,240,125.00, that the trade-in value of the Relinquished Cessna 525A was $4,725,000.00, and that the cash trade difference was $2,515,125.00 (Loren Cook's Exhibit 2, document 13, LCC 000240; Tr. at pp. 93-96).

4. Loren Cook's Transaction is Distinguishable From *Great Southern Bank v. Director of Revenue*

The Respondent's additional use tax assessment was based upon the decision in *Great Southern Bank v. Director of Revenue*, 269 S.W.3d 22 (Mo. banc 2008). However,

as reflected in both the Respondent's own audit report and the transcript of the hearing in this case, the Director's reliance on *Great Southern Bank* here is misplaced as the facts here are clearly distinguishable. In *Great Southern Bank*, the AHC, as well as the Missouri Supreme Court, ruled that a use tax trade-in exemption was not available because there were two transactions, the sale of the old aircraft and the purchase of a new one, which were not mutually dependent upon one another. In other words, the transactions were separate and independent, and the closing of one transaction was not dependent upon the closing of the other transaction.

The *Great Southern Bank* Court based its rulings upon the lack of participation by the qualified intermediary in the transactions and the independence of the two transactions. But the facts in *Great Southern Bank* are clearly distinguishable from the facts before the Court in this case, and the Respondent acknowledged as much. (Tr. at pp. 30–31.)

First, the intermediary in this case, TVPX, is registered with the FAA as an aircraft dealer (Tr. at p. 93), and participates in numerous transactions involving the purchase and sale of aircraft (Tr. at p. 88), while in *Great Southern Bank*, Wachovia, a bank and not an aircraft dealer (registered or otherwise), merely acted as a qualified intermediary (Tr. at p. 101).

Second, TVPX actually bought and sold each of the aircraft as reflected in the documents necessary for the transaction. Title to the aircraft was transferred to TVPX and TVPX had record ownership and possession of the property. *See, e.g.*, the FAA and

warranty bills of sale to the intermediary (Loren Cook's Exhibit 1, documents 21 and 22, LCCs 000401-411; Loren Cook's Exhibit 2, documents 16 and 17, LCCs 000248 and 000250). In *Great Southern Bank*, the AHC placed great weight on the fact that Wachovia was only "deemed" to have acquired the aircraft pursuant to the Internal Revenue Code, and that the economic reality was that there was no actual record of a sale to Wachovia. In Loren Cook's transaction, however, the record is clear that TVPX is not simply "deemed" to have acquired the plane in a trade in but, rather, title for the Purchased Cessna 525B actually passed from TVPX to Loren Cook, title for the Relinquished Cessna 525A actually passed from Loren Cook to TVPX, Loren Cook issued a bill of sale and Kansas resale exemption certificates were completed and filed attesting to these facts. (Loren Cook's Exhibit 1, document 24, LCCs 000415-416). Accordingly, Loren Cook cannot simply be "deemed" to have satisfied the trade in requirements of RSMo § 144.025.1, but rather actually satisfied the requirements.

Third, as actual owner, TVPX bore the economic risk of loss should something have gone terribly wrong (Tr. at pp. 96-97 and at pp. 108-111.). For example, in the short amount of time TVPX owned either plane a natural disaster, such as a tornado or earthquake, could have destroyed either plane while under the ownership of TVPX. Although TVPX could be contractually indemnified by Loren Cook, there is no guarantee that TVPX would have been able to collect from Loren Cook under such indemnity. (Loren Cook's Exhibit 1, document 6, LCC 000330, Tr. at p. 97 and at pp. 108-111.) Nor was any release available as to any claim by a third party. (Tr. at p. 97.) Accordingly,

TVPX did actually bear economic risk of loss during its actual ownership of the planes and TVPX's ownership was not illusory and lacking substance.

Fourth, unlike Wachovia Bank in *Great Southern Bank*, the evidence presented here is that TVPX did not merely act as an agent of Loren Cook. (Tr. at pp. 78–79.) In fact, TVPX acted independently as a registered aircraft dealer. (Tr. at pp. 92–93, 95–96.)

Fifth, as actual owner, TVPX had the ability to sell the planes to third parties. Although contractually obligated to sell each plane to a specified purchaser, thus recognizing the mutual interdependence of the transaction, TVPX could have breached the contract and sold one or both of the planes to an unspecified purchaser had it proven economically beneficial to do so. (Tr. at pp. 117-118.) TVPX's ability to sell the plane to a third party, combined with its potential economic risk of loss, evidence that TVPX was in fact the true owner of the planes and that its ownership cannot be ignored.

Finally, unlike in *Great Southern Bank*, an invoice and bill of sale reflecting the trade-in (thus complying with the Missouri statute) exists here (Loren Cook's Exhibit 2, document 13, LCC 000240; Tr. at pp. 93-96).

5. Similar Transactions in Other States Have Been Found to Qualify for Trade-In Credit.

Other states with similar statutory exemptions have permitted the trade-in allowance in like circumstances. Nebraska's statute, for example, provides that "Sales price does not include credit for any trade in as follows: … (d)(i) The value of property

taken by a seller in trade as all or a part of the consideration for a sale of property of any kind or nature." N.R.S. § 77-2701.35(3)(d)(i).

In a private letter ruling, dated December 16, 2004, the Nebraska Department of Revenue determined that a transaction with substantially similar facts as here, satisfied the trade-in requirement. (A-1–A-2) In the letter ruling, the taxpayer assigned to the intermediary its rights and most of its obligations in the sales agreement of the relinquished aircraft. The title to the relinquished aircraft was transferred to and placed in the name of the intermediary. The intermediary then sold the relinquished aircraft and placed the proceeds in escrow. The taxpayer also assigned to the intermediary its rights in a purchase agreement on a replacement aircraft. The taxpayer transferred additional funds to the escrow account for the purchase of this aircraft. The intermediary purchased the new aircraft from the manufacturer with funds from the escrow account, and the replacement plane was titled in the intermediary's name. The intermediary then sold the replacement plane to taxpayer. These facts are very similar to those in the instant case.

The Texas trade-in statute likewise provides that "'Sales' price or 'receipts' does not include any of the following if separately identified to the customer by such means as an invoice, billing, sales slip or ticket, or contract: … (5) the value of tangible personal property that: (A) is taken by a seller in trade as all or part of the consideration for a sale of a taxable item; and (B) is of a type of property sold by the seller in the regular course of business."

In Texas Policy Letter Ruling No. 200903447L, dated March 30, 2009 (A-3–A-7), the Texas Tax Policy Division of the Window on State Government determined that a transaction, which is likewise substantially similar to Loren Cook's facts, satisfied the trade-in requirement.

In the letter ruling, the taxpayer found a new replacement aircraft and a buyer for its old replaced aircraft. Then the taxpayer assigned its rights to sell the old replaced aircraft to the intermediary. In addition, taxpayer assigned its rights to purchase the new Cessna 550 to the intermediary. Cessna Aircraft Company in turn agreed to transfer the Cessna 550 to the intermediary. Taxpayer purchased the Cessna 550 in Kansas from the intermediary using a like-kind exchange agreement. The exchange qualified for a valid trade-in if the aircraft is a type of property sold by the intermediary in the regular course of its business; the sale/trade-in transaction of the Cessna 550 and taxpayer's old aircraft was separately identified to the taxpayer by such means as an invoice, billing, sales slip or ticket, or contract; and intermediary 's books and records indicate that intermediary had title to the Cessna 550 and took title to the taxpayer's old aircraft in exchange as partial consideration for the Cessna 550 purchased by taxpayer.

Both the Nebraska and Texas letter rulings, involving statutes and factual circumstances substantially similar to Loren Cook's here, reflect transactions determined to be valid trade-ins. Because there is no material difference in the Nebraska, Texas or Missouri statutes, the same reasoning and result should apply. Loren Cook is entitled to claim the use tax trade-in exemption.

6. The Relinquishment of the Relinquished Cessna 525A and Purchase of the Cessna 525B were Mutually Interdependent under Federal Law.

Under the federal tax laws that govern a tax-free exchange of property, the transactions must constitute an exchange. A transaction will qualify as an exchange where there is a reciprocal transfer of property. See Treas. Reg. § 1.1002-1(d). The reciprocal transfer of property requirement is satisfied where the transfer of the properties is mutually dependent. Or, as stated in another way, the transfer of the first property must be conditioned on the receipt of *like-kind property*, and the receipt of the *like-kind property* must be conditioned on (or dependent on) the transfer of the first property. *See Bloomington Coca-Cola Bottling Co. v. Commissioner*, 189 F.2d 14 (7th Cir. 1951) (under § 112(b) of the Internal Revenue Code of 1939 (the predecessor to § 1031 of the Internal Revenue Code of 1986)). An exchange of property that properly qualifies as a tax-free exchange under Internal Revenue Code of 1986 § 1031 under the circumstances presented here, which is undisputed, should also be treated as qualifying as a trade-in transaction under Missouri sales tax laws. That is, no Missouri statute prohibits a like-kind exchange from receiving trade in credit under Missouri sales tax (or use tax) laws.[4]

Accordingly, when Loren Cook purchased the Purchased Cessna 525B from TVPX, TVPX was the true owner and title holder of the Purchased Cessna 525B. At that time, pursuant to the Exchange and Trade in Contract, Loren Cook would only purchase

[4] As set forth *supra*, the Missouri use tax statutes contemplate the possibility of an exchange of property. *See* pp. 12-13, *supra*.

the Purchased Cessna 525B from TVPX if TVPX would take the Relinquished Cessna 525A from Loren Cook as a trade-in. As such, the relinquishment of the old aircraft and the purchase of a new one, were mutually dependent upon one another.

C. The Administrative Hearing Commission erred in failing to apply its decision on a prospective-only basis, because decisions which are not reasonably foreseeable or reflect new policy are to be applied prospectively only under RSMo §§ 32.053 and 143.903, in that the decision was not reasonably foreseeable because it goes beyond previous Missouri Supreme Court precedent.

1. Standard of review:

The question of whether a tax ruling was unexpected and should only be applied prospectively is a question of law, and such questions are reviewed de novo. *See Branson Properties USA, L.P. v. Director of Revenue*, 110 S.W.3d 824, 825 (Mo. banc 2003).

2. The AHC's holding expands that of *Great Southern Bank* and, if upheld by this Court, should be applied only on a prospective basis.

RSMo § 32.053 provides that "[a]ny final decision of the department of revenue which is a result of a change in policy or interpretation by the department effecting a particular class of person subject to such decision shall only be applied prospectively." Similarly, RSMo § 143.903 provides that "an unexpected decision by or order of a court

of competent jurisdiction or the administrative hearing commission shall only apply after the most recently ended tax period of the particular class of persons subject to such tax imposed by chapters 143 and 144, RSMo, and any credit, refund or additional assessment shall be only for periods after the most recently ended tax period of such persons." *See also Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, 356-57 (Mo. banc 2001).

Loren Cook submits that a decision to uphold the assessment of use tax or to uphold the denial of refund claims against it is inconsistent with *Great Southern Bank*'s holding that the "taken in trade" exemption applies to the use tax. Moreover, based on the foregoing, the trade-in transaction here complies with the letter and spirit of RSMo §144.025.1 in ways that the transaction in *Great Southern Bank* did not. In fact, Petitoner completed the trade-in transaction here on June 27, 2007, and the AHC decision in *Great Southern* was not handed down until October 25, 2007. Therefore, a reasonable person would not have expected the "taken in trade" exemption to be inapplicable based on prior law. Accordingly, an adverse decision would be an unexpected result for Loren Cook and any assessment arising from it should only be applied prospectively.

III. CONCLUSION

For the forgoing reasons, Appellant Loren Cook Co. respectfully requests that this Court reverse the Administrative Hearing Commission and hold that the taken in trade exemption found at RSMo §144.025.1 applies to the trade in transaction here, or in

the alternative, to reverse the result and apply an adverse ruling on a prospective-only basis.

Respectfully submitted,

POLSINELLI SHUGHART PC

/s/ Jon R. Dedon

MARK A. OLTHOFF (MO #38572)
SCOTT LINDSTROM (MO #57153)
JON R. DEDON (MO #62221)
POLSINELLI PC
1600 Twelve Wyandotte Plaza
120 W 12th Street, Suite 1600
Kansas City, Missouri 64105
(816) 421-3355
(816) 374-0509 (FAX)
molthoff@polsinelli.com
slindstrom@polsinelli.com
jdedon@polsinelli.com

ATTORNEYS FOR APPELLANT

CERTIFICATE OF COMPLIANCE WITH MISSOURI SUPREME COURT RULE 84.06(B)

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) in that according to the word count function of Microsoft Word by which it was prepared, contains 6,301 words, exclusive of the cover, the Certificate of Service, this Certificate of Compliance, and the signature block.

/s/ Jon R. Dedon
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing was filed electronically this 20th day of May, 2013, causing a true and correct copy to be transmitted to:

JAMES R. LAYTON
Solicitor General
MO #45631
Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102
(573) 751-1800
(573) 751-0774 (facsimile)
James.Layton@ago.mo.gov

ATTORNEY FOR RESPONDENT

/s/ Jon R. Dedon
Attorney for Appellant